

May 15, 2018

VIA ECFS

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141*

Dear Ms. Dortch:

Granite Telecommunications, LLC (“Granite”), through its undersigned counsel, submits this letter in support of INCOMPAS’s Motion to Dismiss¹ and Motion for Extension of Time² filed in the above-captioned proceeding.³ As explained below, the Commission’s own rules and the Administrative Procedure Act (“APA”) require that the Commission grant one of the INCOMPAS motions.

Motion to Dismiss. As INCOMPAS explained, the USTelecom Petition⁴ “relies on confidential data and purported interviews not attached to the Petition as part of [USTelecom’s] *prima facie* case” as well as “data compilations and analysis . . . not . . . included with the Petition” and should therefore be dismissed for failure to comply with 47 C.F.R. § 1.54, the Commission’s

¹ Motion to Dismiss of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) (“Motion to Dismiss”).

² Motion for Extension of Time of INCOMPAS, WC Docket No. 18-141 (filed May 11, 2018) (“Motion for Extension of Time”). Granite also supports CALTEL’s Revised Motion for Extension of Time and for Protective Order. *See* Revised Motion for Extension of Time and for Protective Order of the California Association of Competitive Telecommunications Companies, WC Docket No. 18-141 (filed May 15, 2018).

³ *Pleading Cycle Established for Comments on USTelecom’s Petition for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section 271 and 272 Requirements*, Public Notice, WC Docket No. 18-141, DA 18-475 (rel. May 8, 2018).

⁴ *See* Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (filed May 4, 2018) (“Petition”).

“complete-as-filed” rule.⁵ But even if the Commission were to somehow disagree that the Petition violates the complete-as-filed rule, omission of the relevant information and data from the record of this proceeding would violate the APA. It is therefore appropriate for the Commission to dismiss the Petition.

The APA requires the Commission to “give interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments.”⁶ The D.C. Circuit has clarified that this “opportunity for comment must be a meaningful opportunity.”⁷ Given the APA’s requirements, “[i]t would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”⁸ Accordingly, the Commission must make available for notice and comment the information and data upon which it relies. Doing so “ensures that an agency does not ‘fail[] to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary’ so that ‘a genuine interchange’ occurs.”⁹ Failure to do so results in “serious procedural error” over which a court may reverse the Commission’s decision.¹⁰

Motion for Extension of Time. If the Commission does not dismiss the Petition, the Commission should, at a minimum, (1) require USTelecom to submit the necessary information and data and (2) reset the comment period to ensure that parties have sufficient time to analyze and comment on the information and data.

⁵ Motion to Dismiss at 1-2.

⁶ 5 U.S.C. § 553(c). The D.C. Circuit has indicated that proceedings established for the review of petitions for forbearance are rulemaking proceedings. *See Verizon v. FCC*, 770 F.3d 961, 966-67 (D.C. Cir. 2014) (“[I]t should be obvious that a section 10 forbearance petition is a request for a rulemaking, since it seeks a modification of a rule which has *only* future effect.”).

⁷ *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009); *see also Gerber v. Norton*, 294 F.3d 173, 179 (D.C. Cir. 2002).

⁸ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008).

⁹ *Id.* at 236-37 (quoting *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982)); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (“An agency’s denial of a fair opportunity to comment on a key study may fatally taint the agency’s decisional process.”); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (stating that an agency must “disclose in detail . . . the data upon which [a proposed] rule is based” to ensure that the requisite “exchange of views, information, and criticism between interested persons and the agency” occurs).

¹⁰ *Conn. Light & Power Co.*, 673 F.2d at 530.

First, as explained, the Commission must make available to interested parties the information and data upon which USTelecom relies in the Petition so that they may engage in the type of “meaningful commentary” that produces “a genuine interchange.”¹¹ This will enable evaluation of USTelecom’s claims in a manner that complies with the APA requirement that interested parties have an opportunity to review “data, views, or arguments”¹² and will protect against reversible error.

Second, as INCOMPAS explained, “[u]nder any reasonable interpretation of” the standard for setting a pleading cycle set forth in the *Forbearance Procedures Order*, “the Petition qualifies as ‘complex.’”¹³ This means that a pleading cycle longer than the 45-day default is warranted. The pleading cycle proposed by INCOMPAS – 90 days for comments and 30 days for replies – will permit interested parties to analyze the relevant information and data. And because a large amount of that information and data is confidential and must be governed by a protective order, a 90-day comment period accounts for the time needed to follow the Commission’s procedures to grant counsel and experts access to confidential materials. Moreover, the accelerated release of the Public Notice further justifies resetting the comment period to 90 days. The Public Notice setting the pleading cycle was released only four days after the Petition was filed, which is 11 days shorter than the period for “Initial Review by Commission Staff” set forth in the Wireline Competition Bureau’s Forbearance Timeline.¹⁴

Commission precedent supports extending the pleading cycle in the manner INCOMPAS proposes. In fact, the Commission has granted significant extensions of both initial comment and reply periods in numerous complex proceedings that turned on analysis of large volumes of information and data.¹⁵ Notably, as USTelecom no doubt recalls, in the Business Data Services proceeding, the

¹¹ *Am. Radio Relay League*, 524 F.3d at 236-37.

¹² 5 U.S.C. § 553(c).

¹³ Motion for Extension of Time at 2.

¹⁴ See *id.* at 2 n.4 (citing Federal Communications Commission, Wireline Competition Bureau, Forbearance Timeline, <https://www.fcc.gov/general/forbearance-timeline#block-menu-block-4>).

¹⁵ See, e.g., *Bridging the Digital Divide for Low-Income Consumers*, Order, 33 FCC Rcd. 214, ¶ 3 (WCB 2018) (granting a four-week extension of the comment period, which the Commission expected would “result in a more robust record to inform [its] decision-making”); *Comment Period Extended for Further Notice of Proposed Rulemaking on Network Non-Duplication and Syndicated Exclusivity Rules*, Public Notice, 29 FCC Rcd. 3925, ¶ 1 (MB 2014) (granting 45-day extensions of the comment and reply comment periods in response to a request based on the need to “retain expert economists and other analysts to provide the requested information [in the FNPRM] and that such experts would require more than the currently allotted time to conduct the necessary research and analysis”); *Wireless Telecommunications Bureau Extends Period to File Reply Comments on Proposed Rules to Expand Access to Mobile Wireless Services Onboard Aircraft*, Public Notice, 29 FCC Rcd. 2639, 2639 (WTB 2014) (granting a 60-day extension of the reply comment period in response to a request for more time

Commission granted multiple extensions of time at the request of the ILECs.¹⁶ The complex factual and legal issues presented in the Petition warrant the same careful consideration by interested parties, their experts, and the Commission.

Please contact the undersigned with questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

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to “address the complicated technological, legal, and policy issues raised by the *Notice* and the initial comments”).

¹⁶ See, e.g., *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order, 30 FCC Rcd. 12298, ¶ 1 (WCB 2015) (extending the comment and reply comment periods by approximately six weeks and eight weeks, respectively, pursuant to a joint request by USTelecom and the Independent Telephone & Telecommunications Alliance (“ITTA”)); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order, 30 FCC Rcd. 14467, ¶ 1 (WCB 2015) (extending the comment and reply comment periods by two and a half weeks at the request of USTelecom and ITTA); *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order, 31 FCC Rcd. 7753, ¶¶ 1, 3 (WCB 2016) (extending the reply comment period by 14 days at the request of NCTA, USTelecom, and ITTA).